Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5481

IRVING BERLIN, BENJAMIN EDELSTEIN, ALBERT SARFATY, HYMAN SINGER, and GENE RAY JARRETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

IRVING BERLIN, BENJAMIN EDELSTEIN, ALBERT SARFATY, HYMAN SINGER, and GENE RAY JARRETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, IRVING BERLIN, BENJAMIN EDELSTEIN, ALBERT SARFATY, HYMAN SINGER and GENE RAY JARRETT, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 12, 1977.

JUDGMENT BELOW

The unpublished judgment of the United States Court of Appeals for the Fifth Circuit appears in Appendix "A" attached hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a conflict is present between the Circuit Courts of Appeals as to the interpretation of Title 18 U.S.C.A. §2518(1)(c).

2. Whether the Government's attempt to comply with Title 18 U.S.C.A. §2518(1)(c) was inadequate in that affidavits submitted for this purpose were conclusory and did not provide sufficient facts from which a detached judge could determine whether alternate, viable investigative procedures existed, and whether such failure to so comply is grounds for suppression of the seized conversations.

3. Whether, assuming arguendo that the Hart Affidavit was insufficient in that it did not comply with the mandates of 18 U.S.C. §2518(1)(c), all evidence obtained pursuant to a search warrant must be suppressed as fruits of an illegal "search".

4. Whether, since there was no warrant to search the person and possessions of Elaine Sarfaty, any and all

evidence seized from her person and possessions must be suppressed, and any evidence obtained as a result of a search which was the fruit of the initial search and seizure, must likewise be suppressed.

STATUTE INVOLVED

Title 18 U.S.C.A. §2518(1)(c). Procedure for interception of wire or oral communications.

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication *shall* be made in writing upon oath or affirmation to a judge of competent jurisdiction and *shall* state the applicant's authority to make such application. Each application *shall include* the following information:
>
> * * *
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. (Emphasis Supplied)

STATEMENT OF THE CASE

On or about August 25, 1975, the grand jury sitting in the Northern District of Georgia, returned a two-count indictment charging the Petitioners with the following: In Count I, with a violation of Title 18 U.S.C. §371 (conspiracy); and in Count II, with a violation of Title 18 U.S.C. §§1955 and 2 (operation of illegal gambling business in violation of the laws of Georgia, and aiding and abetting.).

The Petitioners were arraigned on September 17, 1975, each of them entering pleas of not guilty. Thereafter, numerous motions were filed, including motions to suppress evidence, and hearing was had thereon.

On October 18, 1976, each of the Petitioners waived trial by jury and submitted the case to the District Court upon a stipulated set of facts. On October 19, 1976, each of the Petitioners were found guilty of both Count I and Count II. Following the convictions and sentencing, Petitioners appealed the judgments to the United States Court of Appeals for the Fifth Circuit and that Court affirmed.

In the case at bar, the Government obtained almost all of its evidence against the Petitioners by way of a wire interception which began on December 4, 1974; and later by way of eighteen search warrants based in part on information obtained as a result of the court-authorized wire interceptions.

It is the position of the Petitioners that the affidavit of Federal Bureau of Investigation Agent Gary Hart, dated December 4, 1974, which was used in support of the application for the wiretap order, was insufficient in that it contained mere conclusions and failed to set forth facts adequately showing why traditional investigatory techniques of alleged gambling activities were not sufficient. If, in fact, the conclusory affidavit of Agent Hart is not applicable by this Honorable Court, then any and all evidence obtained as a result of the wire interceptions must be suppressed, and additionally, any and all evidence obtained as a result of the search warrants must be suppressed as the fruits of an illegal search and seizure.

Testimony was given before the Honorable Allen L. Chancey, Jr., United States Magistrate, by L. Eades Hogue, the Department of Justice trial attorney who made application for the wiretap orders in the case at bar. He explained that the first wiretap order was applied for on December 4, 1974, and sought to intercept wire communications for approximately fourteen telephones. Utilized in the application for the wire interception was the affidavit of F.B.I. Agent Gary Hart, dated December 4, 1974.

On cross-examination, testimony was elicited showing that on November 7, 1974, an order for the installation of a pen register had been issued. Mr. Hogue testified that prior to having the order for wire interception signed by Judge O'Kelley, he did not talk to any of the three confidential informants mentioned in the Hart affidavit. Additionally, Mr. Hogue conducted no grand jury proceedings prior to the initiation of the Title III on December 4, 1974, regarding the underlying investigation. Not only was immunity not offered to anyone, including the confidential informants, but Mr. Hogue stated that he did not even know the identity of any of the informants. Furthermore, Mr. Hogue did not direct that any physical surveillance be conducted, and no searches of any homes, persons or vehicles was done prior to the order of December 4, 1974. Later, the following dialogue between Oscar B. Goodman, attorney, and Hogue occurred:

> Q As far as a discussion with Mr. Hart concerning the investigatory activities which took place, what did he indicate to you as far as a potential grant of immunity to the sources of informants which he was relying upon?

A If my recollection is correct, Mr. Hart didn't want to disclose the identities of these informants and we never seriously considered granting immunity to these informants.

Not even any alleged "bettors" were interviewed prior to the Title III application.

The affidavit of Agent Hart was nineteen pages long, and had attached several exhibits. Paragraphs 26 and 27, at pages 17 and 18 of the affidavit, read as follows:

Based on my experience and that of other Special Agents of the FBI who have been engaged in this investigation, I believe that normal investigative procedures appear very unlikely to succeed in establishing the full extent of the conspiracy in which the principals and others unknown are involved. My experience has also shown that searches of gamblers, gamblers' residences or gambling establishments have not resulted in locating and gathering physical evidence to prove all the elements of the offenses involved. Experience has also shown me that gamblers and persons involved in gambling keep very limited records and do, in many instances, destroy these records before a search warrant can be executed. Additionally, my experience has also shown that records which have been seized in the past in gambling cases generally have been insufficient to establish all the elements of Federal offenses because such records are difficult to interpret and are of limited significance without further knowledge of the gambler's activities. Therefore, I believe the interception of telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violations of the statutes heretofore set forth.

Sources One, Two, and Three, have all stated that they will not testify under any circumstances to the information they have provided because of their fear of retaliation by the operators of this sports bookmaking business.

The application of Mr. Hogue which accompanied the Hart affidavit in general terms stated that "the attached affidavit contains a full and complete statement explaining why normal investigative procedures either have been tried and have failed, or reasonably appear unlikely to succeed if tried." The Hart affidavit contains the same basic conclusory statement.

In seeking the wire interception, Agent Hart relied on certain "facts and circumstances" including three confidential sources, observations by the affiant and other FBI agents, and "affiant's experience and training".

Where alleged gambling operations were being conducted, the Government has long believed that the only way to obtain evidence for, or a conviction of, gambling operations, was by way of wiretaps. This view, though erroneous, is reflected in Agent Hart's affidavit where he notes that searches of gamblers and their residences do not produce physical evidence, and that gamblers destroy records. Oddly enough, in the case at bar, evidence of "gambling activities" was seized at each location searched, and it is the position of the Petitioners herein that all of the fruits of the searches must be suppressed for failure to follow the exhaustion of other investigative means mandated of Title 18 U.S.C. §2518(1)(c).

Petitioners contend that the application in the case at bar presents mere bald conclusions similar in style and content to numerous previous wiretap applications

which are now being stricken down by the courts. In this case, it is submitted that the evidence referred to in the affidavit, combined with the evidence which would have been seized pursuant to search warrants, would have been sufficient to prove this case without a wiretap. The affidavit indicated in broad "boiler-Plate" language mandates the opposite result.

In the case at bar, besides the contention that the affidavit did not sufficiently state why other investigative means were not possible or were likely to fail, the court was not informed of what the Government failed to do regarding other investigative means. There had been no grand jury investigation prior to the wiretap; no immunity had been offered and thus none had been denied; the Justice Department attorney did not request physical surveillance; no searches of people, places or automobiles were made until after the wiretap was terminated; and not even undercover agents were utilized.

In addition to the foregoing contentions of Petitioners before the Courts Below, it was submitted that at the time of the execution of the search warrant for the person and residence of defendant ALBERT SARFATY, since there was no warrant issued to search the person or possessions of his wife, Elaine Sarfaty, any and all evidence seized from her person or clothing must be suppressed, and any evidence obtained as a result of this search, which was the fruit of that search, must be suppressed.

After the termination of the wiretaps, and mainly as a result of information obtained through the interceptions, the Government applied for and received numerous search warrants. Among the search warrants

obtained were search warrants for "Apartment 4, Building 1, 5400 Roswell Road, Atlanta, Fulton County, Georgia", being the residence of the defendant ALBERT SARFATY, and a search warrant for his person. The warrant itself was executed on December 18, 1974, at approximately 7:30 A.M. FBI Agent Ronald E. Kanauber testified during the course of a pretrial hearing held on July 21 and 22, 1976, that at the time of the search, he was assisted by several other FBI agents in searching the person and residence of Mr. SARFATY. When he arrived, SARFATY answered the door, and after properly identifying themselves, the agents were admitted. Also present at the time of the initial search was Mrs. Elaine Sarfaty. Mrs. Sarfaty had come from the upstairs portion of the residence, wearing her robe, and was requested to sit with her husband in the living room during the process of the search. Mrs. Sarfaty was allowed at times to move throughout the residence, but each time she was accompanied by an Agent of the Federal Bureau of Investigation.

Eventually, Mrs. Sarfaty sought permission to leave the premises after the agents had been present for approximately two hours. Agent Kanauber stated that he told her he would allow her to leave the residence but he requested to know what clothing she was going to wear. At this time the upstairs portion of the residence had not yet been searched. Agent Kanauber told Mrs. Sarfaty to select the clothing she wanted to wear and to change in the downstairs bathroom. The agent himself escorted Mrs. Sarfaty upstairs while she selected the clothing. At this time she pointed to a handbook (her purse) and Agent Kanauber told her "I'd

search the handbook to make sure no evidence would be taken from the premises." The clothing which she chose was thereafter searched, and nothing was found. Agent Kanauber thereafter assisted her down the stairs, with himself carrying her purse. Agent Kanauber stated that he thereafter searched the purse and that at the time of searching the purse he did not have a warrant to search either her person or her clothing. Taken from Mrs. Sarfaty's purse was a key to a safety deposit box located at the First National Bank of Atlanta, 3040 Peachtree Road. Also removed from her purse were two certificates of deposits in the amount of $10,000.00 each. Agent Kanauber testified that Mrs. Sarfaty did not consent to the search of her clothing or purse.

Eventually a search of the safety deposit box was conducted by agents of the FBI, and Agent Kanauber testified that Mrs. Sarfaty did not consent to the search of the safety deposit box, and that in fact she had denied them consent.

REASONS FOR GRANTING THE WRIT

I.

A CONFLICT EXISTS WITHIN THE CIRCUITS AS TO THE INTERPRETATION OF WHAT IS REQUIRED PURSUANT TO THE DICTATES OF 18 U.S.C. §2518(1)(c).

The Fifth Circuit in the instant case reaches a conclusion which is in conflict with the Ninth Circuit's decision in *United States v. Kalustian*, 529 F.2d 585 (9th Cir., 1975), a copy of which is set forth in Appendix "B" attached hereto.

II.

THE GOVERNMENT FAILED TO COMPLY WITH THE PROVISIONS CONTAINED IN TITLE 18 U.S.C.A. 2518(1)(c) SINCE THE AFFIDAVIT SUBMITTED WAS BASED ON CONCLUSORY ALLEGATIONS AND DID NOT PROVIDE SUFFICIENT FACTS FROM WHICH A DETACHED JUDGE COULD DETERMINE WHETHER ALTERNATE, VIABLE INVESTIGATIVE PROCEDURES EXISTED: SUCH FAILURE REQUIRES SUPPRESSION OF THE SEIZED CONVERSATIONS.

In support of this argument, the Petitioners rely upon *United States v. Kalustian*, 529 F.2d 585 (9th Cir., 1975), in which the Ninth Circuit Court of Appeals held that affidavits that rely on conclusory allegations and boiler-plate language to show the unavailability of other investigative techniques are insufficient to meet the standard set forth in Title 18 U.S.C.A. 2518(1)(c) which provides that applications for wire interceptions include:

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

After a comparison of the assertions in these affidavits with those of *Kalustian*, it is submitted that the statements herein are no more adequate in satisfying Section 2518(1)(c) than those in the *Kalustian* case. Nowhere in the present applications does the Government adequately show why other

investigatory techniques are not adequate for this particular case. The mere conclusions of the Affiant, based upon his experience and the experience of others, and the fact that in the past searches have not always resulted in adequate evidence, are insufficient and do not "provide facts from which a judge or magistrate could determine whether other alternative investigative procedures exist as a viable alternative", *United States v. Kalustian, supra.*

Wiretapping must only be authorized if the precise requirements of Title III are conformed to by the Government; "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices". *Berger v. United States,* 388 U.S. 41, 63 (1971). This Court's review of the wiretap authorization must insure compliance with the statute, and must insure that the issuing judge performed his duties properly and did not "serve merely as a rubber stamp for the police". *United States v. Ventresca,* 380 U.S. 102, 109 (1965).

III.

ASSUMING ARGUENDO THAT THE HART AFFIDAVIT WAS INSUFFICIENT IN THAT IT DID NOT COMPLY WITH THE MANDATES OF 18 U.S.C. §2518(1)(c), ALL EVIDENCE OBTAINED PURSUANT TO A SEARCH WARRANT MUST BE SUPPRESSED AS FRUITS OF AN ILLEGAL "SEARCH".

In support of this argument, the Petitioners rely upon Wong Sun v. United States, 371 U.S. 471 (1963).

After the wire interceptions were terminated on December 17, 1974, Special Agent Hart of the Federal Bureau of Investigation requested eighteen search warrants. In his affidavit submitted to demonstrate probable cause to issue the search warrants, evidence obtained as a result of the wiretap was referred to. If the Court should find that the affidavit of Agent Hart which was utilized in obtaining the wire interception was insufficient in that it did not sufficiently show whether other investigative means had been tried and failed, or why they appeared unlikely to succeed, then the evidence obtained as a result of the issuance of the search warrants must be suppressed as fruits of an illegal search.

IV.

SINCE THERE WAS NO WARRANT TO SEARCH THE PERSON AND POSSESSION OF ELAINE SARFATY, ANY AND ALL EVIDENCE SEIZED FROM HER PERSON AND POSSESSIONS MUST BE SUPPRESSED, AND ANY EVIDENCE OBTAINED AS A RESULT OF A SEARCH WHICH WAS THE FRUIT OF THE INITIAL SEARCH AND SEIZURE MUST LIKEWISE BE SUPPRESSED.

It is the position of the Petitioners herein that the search of the person and articles of clothing of Mrs. Sarfaty was unreasonable under the circumstances in light of the fact that the search warrants themselves did not authorize agents of the Federal Bureau of Investigation to search anything other than Mr.

SARFATY'S person and his residence. The Petitioners are aware of the cases of *Walker v. United States*, 327 F.2d 597, 600 (D.C. Cir., 1963), *cert. denied*, 377 U.S. 956; and *United States v. Johnson*, 475 F.2d 977 (D.C. Cir., 1973), where the District of Columbia Circuit in *Walker* upheld the search of a wallet and bag held by one who shared occupancy of a residence searched under the authority of a warrant; and in *Johnson*, where the Court upheld the search of a purse of a visitor on the premises during the search of the premises pursuant to a search warrant. The Petitioners contend, however, that neither exigent circumstances nor probable cause to search the person and articles of clothing of Mrs. Sarfaty existed in the case at bar, and any evidence obtained must be suppressed.

CONCLUSION

Because of the inconsistency in the standards set forth by the United States Court of Appeals for the Fifth Circuit in the instant decision with the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Kalustian, supra*, and since this issue is one of the few issues which remain extant in the challenge to affidavits and applications in wiretap situations, and for all of the foregoing reasons, it is respectfully requested that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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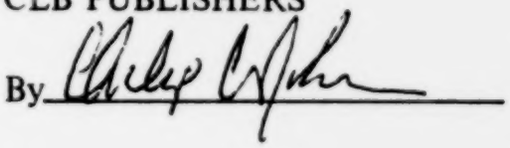
Telephone: (702) 384-5563

Attorney for Petitioners

CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that three true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was, on this 12th day of October, 1977, mailed, postage prepaid, to the Honorable WADE H. McCREE, JR., Solicitor General, United States Department of Justice, Washington, D.C. 20530.

CLB PUBLISHERS

By 

APPENDIX "A"

IN THE UNITED STATES COURT
OF APPEALS
FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 76-4257
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

IRVING BERLIN, BENJAMIN EDELSTEIN,
ALBERT SARFATY, HYMAN SINGER, and
GENE RAY JARRETT,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Georgia

(September 12, 1977)

BEFORE COLEMAN, MORGAN and TJOFLAT, Circuit Judges. PER CURIAM: AFFIRMED. See Local Rule 21.[1] See United States v. McCoy, 5 Cir. 1976, 539 F.2d 1050.

*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966

APPENDIX B

UNITED STATES of America,
Appellee,

v.

Kale KALUSTIAN, Appellant.

UNITED STATES of America,
Appellee,

v.

Patrick Dale POND, Appellant.

UNITED STATES of America,
Appellee,

v.

Stanley Norman GRAY, Appellant.

UNITED STATES of America,
Appellee,

v.

David SELDITCH, Appellant.

UNITED STATES of America,
Appellee,

v.

Otto Vincent MARINO, Appellant.

UNITED STATES of America,
Appellee,

v.

Leopold OBEZO, Appellant.

UNITED STATES of America,
Appellee,

v.

Mable Linda CUCCIA, Appellant.

No. 74-3314, 74-3315, 74-3305, 74-3264 and 74-3265.

United States Court of Appeals,
Ninth Circuit.

Aug. 4, 1975.

As Amended Dec. 11, 1975.

Rehearing and Rehearing En Banc
Denied March 25, 1976.

Defendants were convicted in the United States District Court for the Central District of California, Manuel L. Real, J., of illegal gambling activities, and they appealed. The Court of Appeals, Skopil, District Judge, held that affidavit in support of application for wiretap order was insufficient where it contained mere conclusions and failed to set forth facts adequately showing why traditional investigating techniques of alleged gambling activities by certain named individuals were not sufficient, the Court also held that in order to obtain a wiretap order the Government must inform reviewing judge of every technique which was customarily used in police work in investigating the type of crime involved, and explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of particular circumstances of the case, and an individual's right to privacy which authorization statute seeks to preserve demands no less; it was further held that evidence gathered through invalidly issued wiretap order and its extensions was not admissible.

Reversed and remanded.

1. Telecommunications 496

Procedural steps provided in the Omnibus Crime Control and Safe Streets Act pertaining to electronic surveillance require strict adherence. 18 U.S.C.A. §2510 et seq.

2. Telecommunications 496

The Omnibus Crime Control and Safe Streets Act of 1968 was written to create limited authority for electronic surveillance in investigation of specified crimes thought to lie within the province or organized criminal activities. 18 U.S.C.A. §2510 et seq.

3. Telecommunications 496

Judicial review of wiretap authorization is limited and affidavit in support thereof should not be interpreted in a hypertechnical manner but should be interpreted in a commonsense manner.

4. Telecommunications 496

Within prescribed limits, a close scrutiny must be exercised to determine whether wiretap orders conformed to act authorizing such orders and the review must insure that issuing magistrate properly performed his function and did not serve merely as a rubber stamp for the police. 18 U.S.C.A. §2510 et seq.

5. Telecommunications 496

Affidavit in support of application for wiretap order was insufficient where it contained mere conclusions and failed to set forth facts adequately showing why traditional investigating techniques of alleged gambling activities by certain named individuals were not sufficient. 18 U.S.C.A. §2518(1)(c).

6. Telecommunications 496

In order to obtain a wiretap order the Government must inform reviewing judge of every technique which was customarily used in police work in investigating the type of crime involved, and explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of particular circumstances of the case, and an individual's right to privacy which authorization statute seeks to preserve demands no rest. 18 U.S.C.A. §2518.

7. Searches and Seizures 3.6(3)
Telecommunications 496

Mere conclusions by an affiant are insufficient to justify a search warrant, or a wiretap order and do not provide a basis upon which a detached judge can determine whether other alternative investigative procedures exist as viable alternatives.

8. Criminal Law 394.3

All evidence gathered through electronic surveillance pursuant to an invalid wiretap order and its extensions was inadmissible. 18 U.S.C.A. §2518.

Arthur Lewis (argued), Los Angeles, Cal., for appellant in No. 74-3314.

James A. Twitty, Sp. Atty. (argued), Dept. of Justice, Los Angeles, Cal., for appellee in No. 74-3314.

Edward I. Gritz, Los Angeles, Cal., for appellant in No. 74-3315.

James A. Twitty, Sp. Atty., Los Angeles, Cal., for appellee in No. 74-3315.

David S. Sperber, Los Angeles, Cal., for appellant in No. 74-3305.

William D. Keller, U.S. Atty., Los Angeles, Cal., for appellee in No. 74-3305.

Lee A. Freeman (argued), Los Angeles, Cal., for appellant in No. 74-3264.

Kevin O'Malley (argued), U. S. Dept. of Justice, Los Angeles, Cal., for appellee in No. 74-3264.

James Edward Green (argued), Van Nuys, Cal., for appellant in No. 74-3265.

Kevin F. O'Malley (argued), U. S. Dept. of Justice, Los Angeles, Cal., for appellee in No. 74-3265.

OPINION

Before ELY and HUFSTEDLER, Circuit Judges, and SKOPIL,* District Judge.

SKOPIL, District Judge:

Appellants seek review of their convictions for illegal gambling activities. 18 U.S.C. §§1955 and 2. They claim their motions for suppression of evidence were improperly denied. They also argue that there was insufficient evidence to sustain the verdicts.

According to the Government, confidential informants "advised" federal agents in 1971 that defendant Kalustian was operating a bookmaking operation from the Topper Club (Club) in Rosemead, California. Defendants Pond and Marino, among others, were identified as agents for the operation. On December 20, 1971, the Department of Justice sought court orders authorizing wire taps on three telephones at the Club, one at defendant Stempke's residence, and one at the residence of Patricia Jackson. The application was authorized by Attorney General John Mitchell and granted on December 20, 1971. 18 U.S.C. §2518(1)(c) provides that such applications shall include

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The Government attempted to fulfill that requirement through affidavits supplied by Special FBI Agent James Brent (Affidavits), which essentially contained the following representations:

> "The informants named herein have all said that they will not testify to information they have provided, even if granted immunity. * * *

---

*Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, sitting by designation.

"Experience has further established that even though telephone toll records are available which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, are involved in gambling activities over the telephone subscribed to in the name of the Topper Club.***

"Furthermore, such investigative techniques as physical surveillance and the records obtainable on Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, contain little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigation of gambling activities, normal investigative procedures appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephones in violation of Federal laws. My experience and the experience of other Agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offense. I have found through my experience and the experience of other Special Agents, who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy the records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish elements of Federal offenses because such records are difficult to interpret, and many times are of little or no significance without further knowledge of the gamblers' activities. Therefore, the interception of these telephone communications is the only available method of investigation which has

a reasonable likelihood of securing the evidence necessary to prove violation of these statutes. * *

"Wherefore, because of the existence of facts and underlying circumstances of the continuing investigation listed above in paragraphs 4 through 32b, I submit that the probable cause as submitted in paragraphs 3a, 3b and 3d exists; that the extensive normal investigative procedures tried, as set forth in paragraphs 4 through 32b, have failed to gather evidence necessary to sustain prosecution for violation of the offenses enumerated in paragraph 3a, and reasonably appear unlikely to succeed; * * *"

Appellants contend that their motions to suppress the wiretap evidence should have been granted because the Government's application did not satisfy 18 U.S.C. §2518(1)(c). They argue that the supporting affidavits contain bald conclusions rather than facts from which the Attorney General and the judge could determine whether "normal investigative procedures" were viable alternatives to electronic surveillance. §2518(3)(c).

[1] Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Act), 18 U.S.C. §2510 et seq., absolutely prohibits electronic surveillance by the federal government except under carefully defined circumstances and after securing judicial authority. Procedural steps provided in the Act require strict adherence. *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L.Ed.2d 341 (1974). The importance of these procedures reflects the dual purpose of Title III, which is to

"(1) [protect] the privacy of wire and oral communications, and (2) [delineate] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News, pp. 2112, 2153 (hereinafter cited as "History").

[2] Title III was written to create limited authority for electronic surveillance in the investigation of specified crimes thought to lie within the province of organized criminal activity. History, pp. 2153-2163. It was designed to conform to prevailing constitutional standards. *Berger v. New York*, 388 U.S. 41, 87

S. Ct. 1873, 18 L.Ed.2d 1040 (1967); *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). The restraint with which such authority was created reflects the legitimate fears with which a free society entertains the use of electronic surveillance. As stated in *Berger, supra*, "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices". 388 U.S. at 63, 87 S. Ct. at 1885.

Section 2518(1)(c) of the Act

> "is patterned after traditional search warrant practices and present English procedure in the issuance of warrants to wiretap by the Home Secretary. [citation omitted] The judgment [of the judge or magistrate] would involve a consideration of all the facts and circumstances. * * * Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. *See Giancana v. United States*, 352 F.2d 921 (7th Cir. 1965), cert. denied, 382 U.S. 959, 86 S. Ct. 437, 15 L.Ed.2d 362; *New York v. Saperstein*, 2 N.Y.2d 210, 159 N.Y. S.2d 160, 140 N.E.2d 252 (1957). What the provision envisions is that the showing be tested in a practical and common-sense fashion. Compare *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L.Ed.2d 684 (1965)." History, p. 2190.

[3,4] Our review of the wiretap authorization is limited. We are reminded that

> "[w]here [the underlying circumstances in the affidavit] are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *United States v. Ventresca, supra* at 109, 85 S. Ct. at 746.

Within our prescribed limits, however, the utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III. The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny. *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973); *United States v. Cox*, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934, 92 S. Ct. 1783, 32 L.Ed.2d 136 (1972);

United States v. Cox, 462 F.2d 1293 (8th Cir. 1972). Our view of wiretap orders must ensure that the issuing magistrate properly performed his function and did not "serve merely as a rubber stamp for the police". *Ventresca, supra* at 109, 85 S. Ct. at 746.

The affidavits set forth facts from which probable cause to infer the operation of a gambling conspiracy could be gleaned. Nearly all of these "facts" trickled into the ears of FBI agents through the efforts of a series of professional gamblers and bookmakers. Unfortunately, as the affidavits attest, none of the underworld informants are willing to testify. The refusal of the informants to testify is a matter for the court to consider in authorizing electronic surveillance. However, standing alone, it may not be sufficient. Evidence of the telephone numbers used by the bookmaking operation and the identities of some of the conspirators could not successfully support a prosecution without that testimony.

Consequently by investigating officials decided electronic surveillance was imperative. They discarded alternative means of further investigation because "knowledge and experience" in investigating other gambling cases convinced them that "normal investigative procedures" were unlikely to succeed. Agent Brent recites that searches are often fruitless because gamblers keep no records, destroy them, or maintain them in undecipherable codes. Use of the phone company's records alone is inconclusive.

The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view.

> "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of

> wire and oral communications. *These procedures were not to be routinely employed as the initial step in criminal investigation.* Rather, the applicant must state that the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *United States v. Giordano, supra.* (emphasis added).

The Government's position is further undetermined by the activity of other crimefighting organizations. California, among other states, deprives its policemen of electronic surveillance in all cases. This has not prevented them from successfully prosecuting gambling crimes.

Obviously electronic surveillance can facilitate criminal investigation. Because other investigative techniques are usually slower and more difficult, Congress did not require exhaustion of "all possible" investigative techniques before orders for wiretaps could be issued. *U.S. v. Smith*, 519 F.2d 516 (9th Cir., 1975). But Title III does not allow wiretapping to replace such other techniques unless they "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous".

[5,6] The Government failed in this case to satisfy 18 U.S.C. §2518(1)(c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A judge reviewing a wiretap application is handicapped without such a showing. Title III and the individual's right to privacy, which it seeks to preserve, demand no less than a full and complete statement of underlying circumstances.

[7] Mere conclusions by the affiant are insufficient to justify a search warrant, *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964), or a wiretap order. More specifically, they do not provide facts from which a detached judge or magistrate can determine whether other alternative investigative procedures exist as a viable alternative.

[8] The trial court's order denying appellants' motions for suppression of electronic surveillance evidence is reversed, and all consolidated cases are remanded for a new trial. All evidence

gathered through electronic surveillance pursuant to the original §2518 order and its extensions shall not be admitted in subsequent proceedings.

In view of that ruling, the other issues on appeal are not reached.

REVERSED and REMANDED.

Supreme Court, U. S.
FILED
DEC 20 1977
MICHAEL RODAK, JR., CLERK

No. 77-548

In the Supreme Court of the United States

OCTOBER TERM, 1977

IRVING BERLIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1977. The petition for a writ of certiorari was filed on October 12, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavits accompanying the application for an order authorizing electronic surveillance sufficiently established that other investigative methods were inadequate.

2. Whether the search of petitioner Sarfaty's wife's purse before she was permitted to leave their apartment during the execution of a search warrant violated the Fourth Amendment.

STATEMENT

Following a jury-waived trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of conducting an illegal gambling business in violation of 18 U.S.C. 1955 and 2.[1] The court of appeals affirmed (Pet. App. A).

The evidence at trial consisted of a stipulation of facts that demonstrated that petitioners together conducted a gambling enterprise in violation of state law that did business in excess of $2,000 per day (Pet. 4).

ARGUMENT

1. Petitioners contend (Pet. 11-12) that the application for the electronic surveillance from which much of the prosecution's evidence was derived did not show in sufficient detail that "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c). The supporting affidavits, however, belie this contention.[2]

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[1]Petitioners Berlin, Edelstein, and Sarfaty were sentenced to imprisonment for a year and a day and were ordered to serve two years' probation and to pay fines of $3,000 each. Petitioners Singer and Jarrett were sentenced to four months' imprisonment to be followed by two years' probation, and to pay fines of $2,000 each (C.A. App. 7).

[2]An initial affidavit dated November 7, 1974, accompanied an application for installation of "touch-tone decoders" that disclose the numbers dialed from the target telephones. That affidavit was incorporated by reference into the affidavit of December 4, 1974, the adequacy of which is contested by petitioners. An affidavit dated December 11, 1974, which included information derived from the previously authorized surveillance, was submitted with a final application. We are lodging copies of these affidavits with the Clerk of this Court.

The requirements of 18 U.S.C. 2518(1)(c) are satisfied if the application and its supporting affidavit, viewed in a practical and commonsense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), provide a sufficient factual basis for the issuing authority to conclude that traditional investigative techniques will be inadequate to expose the full scope of the criminal activity under investigation or the identity of the participants therein. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Sklaroff*, 552 F. 2d 1156, 1159 (C.A. 5), petitions for a writ of certiorari pending, Nos. 77-164 and 77-169; *United States* v. *Scibelli*, 549 F. 2d 222 (C.A. 1), certiorari denied, June 6, 1977, No. 76-1212; *United States* v. *McCoy*, 539 F. 2d 1050 (C.A. 5), certiorari denied, 431 U.S. 919; *United States* v. *Armocida*, 515 F. 2d 29, 38 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, 423 U.S. 858; *United States* v. *Brick*, 502 F. 2d 219 (C.A. 8). The application in the present case provides such a factual basis.

In the December 4, 1974 affidavit accompanying the application, F.B.I. Agent Gary W. Hart detailed the facts and circumstances surrounding the offense and the targets' participation. The affidavit averred that the government's information up to that point derived from visual observation over a three month period, the use of three reliable informants, the use of court authorized "touch-tone decoders" that revealed the telephone numbers to which illegal wagers were forwarded, and telephone company records. This cumulation of evidence, however, was not sufficient to insure that a violation of 18 U.S.C. 1955 could be proved at a trial, since the informants refused to testify out of fear for their personal safety. While the sources of information noted above supplied probable cause to believe certain individuals were implicated, they could not provide evidence as to the

bookmaking activities that were carried on inside private residences and offices. Moreover, in Agent Hart's experience, the use of search warrants would be ineffective because gambling records often were sketchy, difficult to interpret, and easy to destroy. Finally, drawing on his more than four years' experience in investigating illegal gambling activities, Agent Hart concluded that continued surveillance and other normal investigative techniques would be unsuccessful. This was a sufficient showing to warrant authorization of the intercept orders.

"[T]he purpose of the requirement in section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted." *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909. See also *United States* v. *Kirk*, 534 F. 2d 1262, 1274 (C.A. 8), certiorari denied, June 27, 1977, No. 75-7001. Here, normal investigative methods were followed and found to be insufficient. Others were not attempted because it was the opinion of the agent, based on considerable experience, that no benefit would be derived therefrom. The statutory requirements were thus satisfied.

Petitioners allege, however, that the decision in this case conflicts with the Ninth Circuit's decision in *United States* v. *Kalustian*, 529 F. 2d 585. We acknowledge that the *Kalustian* panel appears to have interpreted 18 U.S.C. 2518 to require somewhat greater specificity in the supporting affidavits than has been required by other courts. But that opinion has not been followed in any other circuit[3] and does not even represent the consistent

[3]See, *e.g.*, *United States* v. *Scibelli*, *supra*; *United States* v. *Hinton*, 543 F. 2d 1002, 1011 (C.A. 2); *United States* v. *Kirk*, *supra*.

view of the Ninth Circuit.[4] Indeed, in *United States* v. *Spagnuolo*, 549 F. 2d 705 (C.A. 9), the court recognized that its circuit's decisions in this area "often lead to results difficult to harmonize" and tried "to promulgate a manageable standard by which to judge affidavits under section 2518(1)(c)." 549 F. 2d at 709-710. The standard it adopted is that "the affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand * * *. An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with section 2518(1)(c). *Kalustian* teaches no more than that." 549 F. 2d at 710. The Ninth Circuit standard as promulgated in *Spagnuolo* was clearly met here. Accordingly, even assuming that some conflict remains between the standard used in the Ninth Circuit and elsewhere, this case does not directly present that issue.[5]

[4]See *United States* v. *Pezzino*, 535 F. 2d 483 (C.A. 9); *United States* v. *Scully*, 546 F. 2d 255 (C.A. 9), certiorari denied, 430 U.S. 970; *United States* v. *Turner*, 528 F. 2d 143 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996.

[5]Since no other court of appeals has followed *Kalustian*, and since the Department of Justice has after *Kalustian* made efforts to conform its applications to the stringent standards of that case (the present applications were submitted about six months before the *Kalustian* decision), we have not believed it justified to ask this Court to review those cases that we have lost in the Ninth Circuit on the basis of this issue. Moreover, this Court has, since the time of the *Kalustian* decision, declined numerous requests to review decisions from the Ninth Circuit and other circuits alleged to be in conflict with *Kalustian* (see *e.g.*, cases cited *supra*, notes 3 and 4); and nothing has happened recently to justify any change in this Court's refusal to review what is, at heart, an intra-circuit conflict of little continuing importance. Cf. *Wisniewski* v. *United States*, 353 U.S. 901.

2. Petitioners' contention (Pet. 13) that evidence seized from Mrs. Sarfaty's purse should have been suppressed is without merit. During the search of the Sarfaty apartment pursuant to a warrant, Mrs. Sarfaty, who was there when the F.B.I. agents arrived at approximately 7:30 a.m. (Pet. 9), stated that she wished to leave the premises. An agent reasonably suspected that evidence might be secreted in the purse she intended to take with her; accordingly, the purse was searched before she was permitted to remove it from the apartment.[6] The search revealed two $10,000 certificates of deposit and a bank safe deposit box key that was among the objects specifically authorized to be seized.[7]

Petitioners assert that the search of the purse was equivalent to a search of Mrs. Sarfaty's person (Pet. 13-14). But petitioners have no standing to assert an invasion of Mrs. Sarfaty's personal Fourth Amendment rights. *Alderman* v. *United States,* 394 U.S. 165, 171-175; *United States* v. *Lisk,* 522 F. 2d 228, 230 (C.A. 7), certiorari denied, 423 U.S. 1078; *Mabra* v. *Gray,* 518 F. 2d 512, 513 (C.A. 7). In any event, the search of the purse, which was among the Sarfaty possessions that were in the apartment when the agents arrived with the search warrant, was simply an incident of the apartment search. Therefore, in the circumstances of this case, the search of the purse was clearly reasonable under the Fourth Amendment. See *United States* v. *Micheli,* 487 F. 2d 429, 431-432 (C.A. 1);

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[6]The clothing that Mrs. Sarfaty selected to wear was also inspected by an agent before she put it on and left the apartment. However, since that inspection produced no evidence there is no occasion to consider the propriety of that search.

[7]The bank safe deposit box was subsequently searched pursuant to a warrant. Petitioners do not challenge the legality of that search.

United States v. *Johnson,* 475 F. 2d 977, 979 (C.A. D.C.); *United States* v. *Teller,* 397 F. 2d 494, 497-498 (C.A. 7), certiorari denied, 393 U.S. 937; *Walker* v. *United States,* 327 F. 2d 597, 600 (C.A. D.C.), certiorari denied, 377 U.S. 956. Compare *United States* v. *Branch,* 545 F. 2d 177, 181-182 (C.A. D.C.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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